STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 25, 2003
V	No. 243293 Eaton Circuit Court
THOMAS RICHARD MOSS, Defendant-Appellee.	LC No. 01-020052-FC

Before: Donofrio, P.J., and Saad and Owens, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the circuit court order granting a new trial to defendant. Defendant was convicted by a jury of assault with intent to murder, MCL 750.83, and was sentenced to 51 to 90 months' imprisonment with 40 days' credit. This case arose from the allegation that defendant, a nurse at the Tendercare West nursing home, attempted to kill an elderly resident by holding a plastic bag over her face. We reverse.

Plaintiff contends that the trial court abused its discretion by granting defendant's motion for a new trial. The trial court divided defendant's motion for new trial into three basic allegations: counsel was ineffective for failing to present additional witnesses; the prosecutor violated *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by failing to advise the defense of exculpatory evidence;[1] and the trial court erred by failing to permit the defense to present evidence that the prosecution's key witness, Tameko Warren, lied in previous employment applications. The issue presented by the prosecutor addresses only the first (ineffective assistance of counsel) claim. However, the prosecutor addresses the other two claims within the ineffective assistance framework, and defendant raises them as alternative bases upon which to affirm the trial court's ruling. These three claims will therefore be addressed in turn.

This Court reviews a trial court's decision to grant a new trial for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). "A motion for a new trial

[1] Although the trial court addressed defendant's allegation that the prosecution violated *Brady*, *supra*, by failing to advise the defense of exculpatory evidence, the court failed to make a definitive ruling concerning this allegation.

based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *Id.*, citing *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Newly discovered evidence is not a basis for a new trial when it would merely be used for impeachment. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Moreover, the trial court may not function as a thirteenth juror and "may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). The trial court's findings of fact are reviewed for clear error and its decisions regarding questions of law are reviewed de novo. *Lester, supra* at 271.

Issues regarding claims of ineffective assistance of counsel likewise present a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Therefore, this Court reviews the trial court's findings of fact for clear error, and the court's legal determinations are reviewed de novo. *Id.* This Court must determine – without engaging in second-guessing or hindsight and after indulging the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance – whether the defendant has demonstrated that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant that it deprived him of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303, 330; 521 NW2d 797 (1994). To make this showing, the defendant must establish that there is a reasonable probability that if the evidence had been presented, the result of the trial would have been different. *Id.* at 314

In *Strickland, supra* at 689, the Supreme Court stated that trial courts must "be highly deferential" when scrutinizing trial counsel's performance and must "eliminate the distorting effects of hindsight." To do this, reviewing courts are required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct" and defendants must overcome the presumption that "the challenged action 'might be considered sound trial strategy.'" *Id.*, citing *Michel v Louisiana*, 350 US 91, 101; 76 S Ct 158; 100 L Ed 2d 83 (1955). The Court further observed in *Strickland, supra* at 690, that

> [t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. *Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense*. Counsel's performance and even willingness to serve could be adversely affected. . . . [Emphasis supplied.][2]

Our Supreme Court has recognized that the failure to call supporting witnesses does not

[2] In this connection, this Court observes that the trial in this case involved fifteen witnesses and just under 400 pages of transcript, while the post-conviction hearing involved nine witnesses and well over 400 pages of transcript – a fact noted by the trial court.

inherently amount to ineffective assistance of counsel. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). This Court has stated that "[i]neffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996), citing *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A defense is substantial if it might have made a difference in the outcome of the trial." *Hyland, supra* at 710-711, citing *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Unlike *Johnson, supra* at 122-124, this case does not involve the failure of trial counsel to present other eyewitnesses to the incident. Defendant and Warren – the nurse assistant who reported the incident – were the only individuals who witnessed the events that transpired in the victim's room on the morning of December 18, 2000. Moreover, the events themselves were not hotly contested. Defendant agreed that Warren observed him standing over the victim with the oxygen tubes removed from her nose and holding, with both hands, a plastic bag that was covering the victim's mouth. In fact, defendant supplemented Warren's observations by admitting that he had administered an unregistered dose of Roxanol.[3] Two witnesses testified that defendant instructed Warren to give the victim a shower to hasten her death – an instruction they both believed was seriously made. The prosecutor's medical expert testified that a shower would have been inappropriate for a ninety-two-year-old, comatose woman who was suffering renal failure and acute bronco-pneumonia and was on "comfort care measures" status. A nurse recounted the strange conversation she had with defendant that night in which he became noticeably nervous when he was informed that the victim's relatives might be taking her out of the facility and admitting her to a hospital; immediately thereafter he repeatedly announced that he had to make his rounds before leaving to go, apparently, to the victim's room.

Additionally, Warren did not immediately report her belief that defendant was attempting to kill the victim; instead, she indicated that she wanted to leave the facility and she reported what she had seen only because another nurse essentially forced her to do so. This strongly indicated that she was not trying to falsely accuse defendant as a means of either "getting back at Tendercare" or ingratiating herself with management. Defendant acknowledged that he did not know Warren and that she had no reason to falsely accuse him.

At the post-conviction hearing, defendant presented eight witnesses – including his trial counsel – and recalled Warren. Trial counsel, who had practiced criminal law for twenty years, was retained for this case. He obtained an investigator, met regularly with defendant, and obtained Warren's employment records. He determined to present one of Warren's previous supervisors to testify concerning Warren's firing at Tendercare South, and he unsuccessfully attempted to locate another witness to bolster the supervisor's testimony; he was surprised when the witness was produced by the prosecution at trial and she contradicted the supervisor's testimony. Trial counsel stated that he considered, but rejected, the idea of presenting certain witnesses that defendant subsequently presented in the post-conviction hearing.

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[3] In this regard, it is significant that defendant took the time to attend to another patient and, before leaving the facility, performed a number of minor tasks – including filling two water containers – but failed to record his alleged administration of Roxanol as he was required to do.

Trial counsel acknowledged that he did not present defendant as a witness; he stated that defendant made the decision not to testify and he concurred – it was a strategic decision that they made together. The tape of defendant's statement to police was played at the trial; the defense theory was that defendant's statement was true. Trial counsel also stated that he made a strategic decision to try to obtain admission of the evidence regarding Warren's past employment history under MRE 404b rather than MRE 608 because if he used MRE 608 he would be "stuck with" Warren's testimony. He acknowledged that he had obtained five of Warren's employment applications and that he attempted in a pre-trial motion to secure their admission to attack Warren's credibility, but the trial court denied the motion.

We have closely reviewed the trial testimony and the testimony presented at the post-conviction hearing and conclude that the proposed testimony would likely have been inadmissible, and that even if it had been presented, there is not a reasonable probability that the testimony would have resulted in a different outcome at trial.

Melissa Justice testified concerning her observations of a meeting between her administrator at Tendercare South, Dennis Faucher, and Warren. Justice did not describe in detail what the meeting was about. According to her statement, Faucher wanted to discuss an incident, Warren became angry with Faucher and threatened to call her lawyer, Faucher asked her to leave his office, and, before leaving, Warren claimed that she had tape recorded the meeting.

Faucher had testified at trial concerning this meeting. He claimed that he fired Warren because she had falsely accused the wife of a patient of abusing her husband. He further claimed that the wife told him that Warren had been borrowing money from her and she refused to lend Warren more. Faucher acknowledged that the written report of his meeting with Warren indicated only that she was suspended for telling a family member that a patient had not been fed. He admitted that this allegation was not correct. The patient's wife testified in rebuttal at trial that she never loaned Warren any money and had never discussed allegations of physical abuse of her husband with Faucher.

The fact that Warren and Faucher exchanged words at a different nursing home some nine months before Warren witnessed defendant's actions was not relevant to the issues properly raised at trial. Moreover, in our view, even if minimally relevant as partial corroboration of Faucher's testimony concerning this meeting, admission of Justice's largely cumulative testimony would not have made a difference in the outcome of the trial. Finally, given the conflicting testimony concerning why Faucher terminated Warren's employment, presentation of this testimony would have confused the jurors and caused them to focus on matters that were only peripheral to the main issue at trial. Accordingly, Justice's testimony was not properly admissible and even if it had been admitted, it was not reasonably probable that a different outcome would have resulted.

The proposed testimony of Monica Goetzinger concerning another meeting between Faucher and Warren would similarly have been irrelevant and inadmissible. According to Goetzinger, Warren had accused a nurse of failing to feed a patient and then had yelled at the nurse in front of the patient's family, and Faucher discharged Warren because of this conduct. Contrary to Faucher's trial testimony, Goetzinger testified that the meeting had nothing to do with an allegation that Warren had claimed the patient's wife was abusing her husband, or that

Warren had improperly obtained a loan from her. Goetzinger was permitted, over the prosecutor's objections, to state that based on her dealings with Warren, "she's not a person that I would rehire."

Goetzinger's testimony would not have been properly admitted at the trial because it was not relevant. MRE 401. The testimony did not relate to the incident at Tendercare West on December 18, 2000, but rather to a different and unrelated incident at Tendercare South nine months earlier. Goetzinger's testimony contradicted Faucher concerning his reason for terminating Warren's employment. It was improper to attempt to use this prior incident to establish a trait of Warren's character – a tendency to make false accusations – to suggest that she acted in conformity with this trait of character on December 18. MRE 404(a). Nor was Warren's character or a trait of her character an essential element of a charge, claim, or defense and, therefore, it would have been improper for this evidence of a specific instance of Warren's conduct to have been admitted at trial.[4] MRE 405(b).

Moreover, Goetzinger's statement that she would not rehire Warren – which defendant apparently felt was an attack on Warren's reputation under MRE 608(b) – was inadmissible. No foundation was established to demonstrate that Goetzinger was aware of Warren's reputation for truthfulness in the relevant community. *People v Walker*, 150 Mich App 597, 602; 389 NW2d 704 (1985). In any event, the statement did not narrowly relate to truthfulness, but rather indicated that Goetzinger would not rehire Warren, a disposition that may well have derived from her observations of Warren's apparently irrational anger during the meeting with Faucher rather than from any knowledge of Warren's reputation for truthfulness. Presentation of Goetzinger's testimony would have caused the trial to slide into a mini-trial on the collateral issue of whether Warren borrowed money and then lied about the patient's wife when she couldn't borrow more. Accordingly, Goetzinger's testimony would not have properly been admitted at the trial and it could not have been ineffective assistance of trial counsel to fail to present her as a witness.

Defendant next presented Joyce Robinson's testimony concerning her brief interaction with Warren at Tendercare South. Robinson stated that she was not present when Warren was discharged and had no knowledge of why she was discharged. Robinson further testified that Warren sought reemployment at Tendercare South, but she was not rehired "due to the problem that existed between [her and] the former administrator." Once again, this testimony was not relevant, MRE 401; it was not admissible under either MRE 404(a) or MRE 405(b) because it was not proper to present a trait of character to prove action in conformity with it and it did not concern an essential element of a charge, claim, or defense; and it was not admissible under MRE 608(b) because it did not state an opinion concerning Warren's reputation for truthfulness in the relevant community – and it was also improper opinion testimony because Robinson gave her opinion regarding why Warren was not rehired. Therefore, Robinson's testimony was not

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[4] It should be noted in this regard that the specific instance of conduct related in Goetzinger's testimony was Warren's behavior in the meeting with Faucher – not whatever she may have done at an earlier time with regard to a nurse in front of a patient's family. Goetzinger was not a witness to the earlier incident and therefore could not properly testify concerning that alleged incident.

properly admissible, and had it been presented at trial, the result would not have been different.

Defendant also presented the testimony of Marion Turner, a former night charge nurse at Tendercare South who testified concerning the incident that occurred on February 12, 2000. Turner indicated that she was told by another charge nurse that Warren had accused the other nurse of failing to feed a patient. Turner investigated the matter, discovered that a doctor had directed that the patient should not be fed, informed Warren of this fact, and had Warren apologize to the nurse. This testimony was simply additional evidence about the collateral dispute concerning Faucher's basis for firing Warren, and Faucher testified at trial that the allegation that Warren accused a nurse of failing to feed a patient was "not correct." Accordingly, Turner's testimony would not have been properly admitted and trial counsel's failure to present it could not have caused defendant prejudice.

Defendant also called Warren and questioned her regarding her employment at a variety of senior care facilities. Warren explained why she left her former employers; specifically, Warren agreed that Faucher fired her at Tendercare South. With regard to employment applications that did not list all of her former employers, dates of employment, or reasons for leaving, Warren testified that she told the interviewer at each new job about the circumstances of her previous employment. She agreed that she accused a nurse at Tendercare South of failing to feed a patient; however, she testified that she did not make this accusation in front of the family. Warren agreed that she followed Turner's instructions and apologized to a nurse for the incident.

Defendant failed to demonstrate that consideration of this past employment history was proper. None of the witnesses attacked Warren's reputation for truthfulness in the relevant community. At most, their testimony was cumulative to Faucher's; however, although Faucher was permitted to testify at trial, and the issue of the propriety of his testimony is not before us, we conclude that his testimony was, at best, only minimally relevant and trial counsel could not have been ineffective for deciding, as a matter of trial strategy, that he would not present additional, cumulative testimony.

Moreover, as the prosecutor argues, there was really no dispute between Warren and defendant concerning what she observed. The dispute was over the interpretation of defendant's behavior. That is, defendant agreed with Warren that he had removed the breathing tubes from the victim's nostrils and that he was standing over her holding a plastic bag over her mouth with both his hands; Warren interpreted this as indicating that defendant was trying to suffocate the victim, while defendant maintained that he was readjusting her oxygen line and that the victim's agonal breathing sucked the plastic bag over her mouth and he was trying to remove it. In fact, defendant additionally claimed that he administered a dose of Roxanol and failed to record it – an assertion that was not supported by the physical evidence and was not observed by Warren. There was simply no evidence that Warren lied about what she observed.

The key new trial witness was Nancy Sparks, a retired nurse, who testified as a medical expert witness for defendant. Sparks gave her opinion concerning a number of medical matters relating to the victim's condition and treatment. For example, Sparks testified that giving the victim a shower would not have hastened her death. She opined that because the victim was listed as "non-responsive," she would not have reacted to someone trying to suffocate her. This testimony would have supported defendant's statement that the victim was not moving when the bag was over her mouth; however, defendant also told the police that the victim had earlier

kicked her leg off the bed and he stated that was not unusual for comatose patients. Sparks also explained that the victim had probably exhibited agonal breathing and that such an intense intake of breath could have lasted for up to ten seconds, could have sucked a plastic bag over her mouth, and could have prevented a healthy man from pulling the bag off. Sparks also stated that she had conducted a similar experiment (using a produce bag) that indicated that such an event could occur.[5]

Sparks testified that the use of "gallows" humor in a nursing facility was commonplace and therefore defendant's comments about helping patients toward death were probably merely coarse humor. However, Sparks acknowledged that she did not know defendant, and it seems more likely that those who worked with him on a daily basis performing the same job would be better placed to interpret his remarks.

Sparks also testified concerning the administration of Roxanol. She stated that although the standard practice was to record the administration of medications at the time they were dispensed, deviations from that practice occurred – even, in some cases, waiting until the following day. However, Sparks acknowledged that it was dangerous to deviate from the standard practice because a second dose of medication could mistakenly be administered; she also admitted she was unfamiliar with defendant's standard practice. She further admitted that the victim's medication chart did not show defendant's signature and that no Roxanol was shown to be missing from the victim's assigned bottle. Furthermore, Sparks was not asked to comment on the fact that defendant performed several inconsequential tasks after he had been asked to leave the facility, but did not perform the one task of primary importance – logging in his alleged administration of Roxanol to the victim on the drug chart. There was no reasonable probability that presentation of Sparks' testimony regarding the administration of medication to the victim would have resulted in a different outcome.

Sparks also testified concerning the likelihood that the victim would vomit when defendant administered a few drops of Roxanol; according to Sparks, the victim suffered from a hiatal hernia and gastroesophageal reflux disease and these conditions would have made it likely that she would vomit. Trial counsel testified that he did not think that the existence of a hiatal hernia would be of evidentiary value and he acknowledged that no one had reported seeing the victim vomit on a previous shift. Sparks observed that there were notations of emesis on the victim's medical chart, but she did not recall if any of these episodes involved Roxanol, and she could not say whether the emesis occurred in the weeks immediately before the victim's subsequent death. Sparks' testimony was contradicted by testimony that the victim's medical

[5] Regarding this "experiment," we cannot conceive that such testimony would have been properly permitted at a trial. It seems highly unlikely that any experiment conducted at home by Sparks could have, in any fashion, replicated the conditions existing when the victim allegedly sucked the bag onto her face. Aside from the fact that Sparks admitted using a different bag, it strains belief to conclude that she performed the experiment on a ninety-two-year-old woman who was comatose, non-responsive, dying of renal failure and bronco-pneumonia, and exhibiting agonal breathing – or that she had a man of defendant's age and musculature attempting to remove the bag. Trial counsel testified that he and defendant also tried such an experiment, but they could not reproduce the bag being sucked in, so they decided not to present testimony about the "experiment."

records did not indicate that she had vomited after being given Roxanol. Sparks further stated that it was not unusual not to have an emesis basin near a patient's bed; however, she admitted she had no knowledge concerning the availability of such basins at Tendercare West.

To explain why Warren might not have clearly seen what she thought she saw, Sparks explained that the lighting in nursing homes at night was very dim; however, she acknowledged she did not know what lights were on in the victim's room. Defendant admitted in his statement to the police that the overhead light was on, and, as noted previously, defendant does not contest *what* Warren observed, rather, he contests how she *interpreted* what she saw.

It is one thing to speculate, as the trial court did, that in light of the prosecutor's presentation of expert medical testimony, it would have benefited defendant to present contrary expert testimony. However, Sparks was a retired nurse, not a doctor. She acknowledged that she was not familiar with the conditions existing in Tendercare West at the time of the incident. She conceded the impropriety of some of the actions taken by defendant. She offered testimony that she had performed an experiment to verify defendant's account of the incident; however, such testimony would not have been admissible at trial because there was no showing that the "experiment" approximated the conditions existing at the time of defendant's assault on the victim. In this hearing the trial court did not consider whether or not witness Sparks would be allowed to offer expert opinion testimony under MRE 702. Moreover, it is doubtful that a proper foundation could have been made to qualify Sparks as an expert under MRE 702. Furthermore, Sparks contradicted several of defendant's admissions. If Sparks' testimony was the best that could be obtained by appellate counsel, who asserted the paramount importance of presenting such testimony, then trial counsel's strategic decision not to present such a witness – arrived at after investigation and due consideration – cannot be a ground for overturning defendant's conviction.

Finally, despite his disclaimers, the trial judge appears to have made his decision largely by using hindsight and second-guessing trial counsel's strategic decisions. This comes across clearly when the trial judge asserted that trial counsel should have called defendant as a witness – even though this was *defendant's* decision – because *he* was convinced juries want to hear from the defendant, and when the judge made such statements as "there were six or eight times during the trial that I was concerned and disappointed that things weren't done or questions weren't asked," and that if he "had known then that [sic – what] I know now about all this other potential stuff that was out there and other ways to attack these theories" he would not have commented that "the evidence was there" to support defendant's conviction. Decisions regarding ineffective assistance of counsel claims are not to be based on hindsight and second-guessing of trial counsel's strategic choices. *Pickens*, *supra* at 330.

We conclude, for the reasons outlined in detail, that most of the proposed witness testimony was inadmissible and that, even if all of the witness testimony outlined above had been presented, it was not reasonably probable that the result of the trial would have been different. *Pickens*, *supra* at 314. We therefore find that the trial court abused its discretion by granting defendant's motion for a new trial on the basis of ineffective assistance of counsel.

Defendant contends the trial court's decision to grant a new trial was alternatively supported by the fact that the prosecutor withheld exculpatory evidence in contravention of *Brady*, *supra*. This allegedly exculpatory evidence was the fact that one of Warren's former

supervisors, Thomas Yeutter, called the prosecutor's office and told the person to whom he spoke that Warren was not credible. We disagree that this was a *Brady* violation.

To establish a *Brady* violation, defendant must show that (1) the prosecution possessed evidence favorable to him; (2) that he did not possess the evidence, or could not have obtained it with reasonable diligence; (3) that the prosecution suppressed the evidence; and (4) that had the evidence been disclosed, a reasonable probability exists that the outcome of the proceeding would have been different. *Lester, supra*, 232 Mich App 281-282, citing *United States v Meros*, 866 F2d 1304, 1308 (CA 11, 1989). "Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Lester, supra* at 282. This Court also observed in *Lester, supra* at 282-283:

> In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. *United States v Payne*, 63 F3d 1200, 1210 (CA 2, 1995), cert den 516 US 1165; 116 S Ct 1056; 134 L Ed 2d 201 (1996).

The court did not definitively rule that the prosecutor suppressed *Brady* material. Moreover, the court failed to determine whether defendant possessed the material, *or could have obtained it himself with any reasonable diligence*. *Lester, supra* at 281. Finally, the court failed to make a harmless error analysis. We conclude that no *Brady* violation occurred, and that, even if one did occur, it was harmless because defendant failed to establish a reasonable probability that, had Yeutter's information been disclosed, the result of the trial would have been different.

According to Yeutter's testimony, he informed someone at the prosecutor's office that they should not build their case against defendant on the basis of Warren's testimony and that, if she said the sky was blue, he would check to see if it was raining. Both the prosecution and the defense had Warren's employment file from Pines Healthcare before trial; Yeutter testified that the file listed his name and contained one of the disciplinary write-ups he did concerning Warren. The defense did not know that Yeutter had contacted the prosecutor's office, but, by the same token, his name was in the file – as was the misconduct report he generated – and the defense did not contact him to discuss any of the employment material.

Yeutter's opinion concerning Warren's credibility would arguably have been material because it would have constituted potential impeachment evidence. The prosecutor possessed this evidence because he had the Pine Healthcare employment file containing Yeutter's misconduct write-up and he was presumptively aware that Yeutter had contacted the prosecutor's office. Furthermore, the prosecutor must be charged with suppression of Yeutter's opinion

regarding Warren's credibility because he did not pass this information to the defense.[6] However, the defense also had the Pine Healthcare employment file and, particularly considering that they had an investigator, with reasonable diligence they could have interviewed Yeutter and discovered his low opinion of Warren's credibility.

Moreover, the generalized opinion that Yeutter had of Warren's credibility – an opinion that was not based on her making false claims of patient abuse – would only minimally have assisted the defense.[7] Yeutter claimed that Warren worked for Pines Healthcare briefly on two occasions, but he did not indicate the reason she was terminated.[8] Finally, it is not clear from the hearing testimony what Warren's response would have been had she been confronted at trial with Yeutter's allegations of misconduct.

Accordingly, defendant failed to establish a reasonable probability that, had the prosecution informed defendant of Yeutter's contact, the outcome of the proceedings would have been different. *Lester, supra* at 281-282. Therefore, defendant's *Brady* claim does not provide an alternative basis for upholding the trial court's grant of a new trial.

Defendant also claims that the trial court's decision to grant a new trial was alternatively supported by the trial court's concession that it erred in refusing defendant's request to present impeachment evidence, in the form of Warren's previous employment applications. Trial counsel did move before trial to be permitted to impeach Warren with evidence of her employment applications, but the trial court ruled that this evidence was not properly admitted as a prior act under MRE 404b.

MRE 404(a) provides, in relevant part:

> **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

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[6] The good faith or bad faith of the prosecutor is irrelevant in determining whether a *Brady* violation has occurred. *Brady, supra,* at 87.

[7] Yeutter related the two incidents that led him to write a misconduct report on Warren: she claimed to have done certain patient caretaking functions and Yeutter concluded that she had not done them, and she created a nurse schedule – either without consulting the master schedule or in defiance of it – that resulted in scheduling several nurses for shifts when they were unavailable. While the former allegation at least asserts that Warren lied, neither of these misconducts involved false reports of patient abuse by a staff person and therefore their relevance is reduced. Moreover, absent some further explanation – which Yeutter does not supply – the latter example as easily demonstrates negligence or incompetence as it does deliberate falsification. Showing that Warren was negligent or incompetent would not impeach her testimony.

[8] Yeutter testified that "[i]n both cases she was terminated in less than ninety days," but he did not indicate why she was terminated. The mention by Yeutter of a specific time period suggests that Warren was let go during her probationary period. At the same time, she *was* employed *twice* by Pines Healthcare. This suggests myriad reasons – other than a propensity for lying – that could account for her termination. Once that subject was opened, and Warren disagreed with Yeutter's claims, a mini-trial on a collateral issue could well have ensued.

(4) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.[9]

Admission of the proposed evidence of Warren's previous employment applications would have been improper because it would have constituted impeachment by extrinsic evidence regarding a collateral issue. *People v Teague,* 411 Mich 562, 566; 309 NW2d 530 (1981); *People v Rosen,* 136 Mich App 745, 758; 358 NW2d 584 (1984). In *People v Vasher,* 449 Mich 494, 504; 537 NW2d 168 (1995), our Supreme Court held:

> A party is free to contradict the answers that he has elicited from his adversary or his adversary's witness on cross-examination regarding matters germane to the issue. As a general rule, however, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters.

The issue in this trial was whether defendant was attempting to murder Quinn when Warren observed him. Whether Warren was employed by many different nursing homes for relatively short periods of time, and the reasons for her departure from these jobs, were questions that were collateral to the issue the jury was to determine. This Court explained in *People v Guy,* 121 Mich App 592, 604-605; 329 NW2d 435 (1983):

> The purpose of the rule that a witness cannot be impeached on a collateral matter by use of extrinsic evidence is to avoid the waste of time and confusion of issues that would result from shifting the trial's inquiry to an event unrelated to

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[9] MRE 607 provides that the credibility of a witness may be attacked by any party. MRE 609 concerns impeachment of a witness with evidence of a previous conviction. Defendant did not attempt to use this provision, presumably because Warren did not have any previous criminal convictions. MRE 608 provides in relevant part:

> (a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
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> (b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

> the offense charged. In order to apply the rule it is necessary to determine what facts are deemed "collateral." According to McCormick on Evidence (2d ed), § 47, p 98, facts which would have been independently provable are not considered collateral for the purpose of this rule.
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> In further discussing the application of the rule, McCormick indicates there are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true.

The evidence regarding Warren's employment applications does not fall within any of these categories. Whether Warren accurately and completely filled in her employment applications for jobs at other nursing homes was not relevant to any of the substantive issues in this case. Nor did this evidence show Warren's "bias, interest, conviction of crime and want of capacity or opportunity for knowledge." *Id.* Nor did this evidence involve Warren's account of the "background and circumstances of a material transaction." *Id.*

Moreover, when questioned at the post-conviction hearing, Warren acknowledged that her employment applications were incomplete or misleading, but she claimed that in each instance she told the interviewers the accurate and complete information regarding her prior employment. In order to disprove her testimony in this regard, defendant would have been required to produce the interviewers. This would have constituted the use of extrinsic evidence to impeach Warren on a collateral matter. *Teague, supra* at 566. Therefore, defendant would have been forced to accept Warren's explanations; because Warren readily admitted that she was not entirely forthcoming when she filled out her employment applications, even if those applications were admitted, defendant would be precluded from inquiring into them further.[10] *LeBlanc, supra* at 590.

Therefore, the trial court erred when it concluded that it should have permitted Warren to be impeached with the employment applications for her previous jobs. Because the trial court incorrectly ruled that this evidence should have been admitted and that defendant was entitled to a new trial at which the evidence could be presented, the trial court abused its discretion in

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[10] For example, when challenged with the fact that she failed to list all of her previous employment on her job applications, Warren agreed, but asserted that she verbally gave the information to the interviewer. In order to disprove this assertion, defendant would have to have presented every person with whom Warren interviewed, and he could not properly have done that because it would have been improper impeachment on a collateral issue. MRE 608(b); *LeBlanc, supra* at 590 ("[I]t has long been the law of this state that a cross-examining attorney must accept the answer given by a witness regarding a collateral matter.")

granting defendant a new trial on this basis.

The order granting defendant's motion for a new trial is therefore vacated and this case is remanded to the trial court with directions to reinstate defendant's conviction.

Reversed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Donald S. Owens